SUPREME COURT, U. S.

FILED

FEB 15 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1968

No. 960

EDWARD J. KAZUBOWSKI,

Petitioner,

vs.

BETTY DOLAR KAZUBOWSKI,

Respondent.

ANSWER TO PETITION FOR A WRIT OF CERTIORARI

PAUL A. CUSHMAN
Baker Building
Kewanee, Illinois 61443

GREGG A. YOUNG
103 South Tremont Street
Kewanee, Illinois 61443

HARPER ANDREWS
CAMPBELL ANDREWS
211 West Second Street
Kewanee, Illinois 61443

Counsel for Respondent

MIDWEST LAW PRINTING CO., CHICAGO (60601), FINANCIAL 6-2900

In The

Supreme Court of the United States

October Term, A.D. 1968

No. 960

EDWARD J. KAZUBOWSKI,

Petitioner,

vs.

BETTY DOLAR KAZUBOWSKI,

Respondent.

ANSWER TO PETITION FOR A WRIT OF CERTIORARI

This cause should not be reviewed by this Court because the allegations of want of due process in the Trial Court and Appellate Court are unsupported by the facts in the record.

I.

The Constitutional Questions Were Not Timely Or Properly Raised So As To Give This Court Jurisdiction.

The objection to the decree of August 31, 1966, and the stipulation on which it is based, the question of the absence of the divorce decree and divorce trial testimony from the record on appeal in the Appellate Court, the propriety of the order of September 23, 1966, for alimony pending the appeal, and the adequacy of the record on

appeal in the Appellate Court were all before the Appellate Court for consideration on the appeal, and there is no reason why the petitioner could not have raised his constitutional questions in that court. Such questions must be raised at the first opportunity. *Brinkerhoff Faris Trust Co. v. Hill*, 281 U.S. 673; *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U.S. 313.

Raising the federal questions in the petition for leave to appeal to the Supreme Court of Illinois, which was denied without opinion, is too late. Raising such questions after the final review in the State Court does not give this Court jurisdiction unless the State Court decided the federal question raised or the grounds of the decision of the State Court are such that petitioner had no previous opportunity to raise his federal question. *Great Northern R.R. Co. v. Sunburst Oil Co.*, 287 U.S. 358, 32 Am. Jur. 2d Federal Practice and Procedure, Sec. 261 (1967).

II.

The Decree Of August 31, 1966, Was Entered After A Full Hearing Without Violation Of Petitioner's Right To Due Process Of Law.

The decree of August 31, 1966, dividing the property between petitioner and respondent was based on a stipulation signed by counsel for both parties and filed and approved in the Trial Court on August 15. The recital in the decree (App. 15, of Petition) concerning a letter from Perona and Perona to Gregg A. Young dated July 27, 1966, about the family dishes, indicates that negotiations began at that time, two days after Mr. Perona appeared for petitioner under the circumstances described in his motion for continuance of the property hearing from July 25 to August 15 (R. 8, 9, 10 and 11).

After the stipulation was filed, the presentation of the decree was set for August 31, during which time petitioner was fully informed of the stipulation and the proposed decree, as shown by his motion to amend the stipulation filed August 31, 1966, and the numerous exhibits consisting of letters and documents and his affidavit of other circumstances (R. 21 to 58).

Petitioner did not claim in his motion that the stipulation was signed without authority but that in the four page stipulation one word was changed without his consent. The change of the word "mortgage" to the word "lien" would have required him to give respondent a mortgage to secure his future payments under the decree, which mortgage would be a second lien on the Kewanee house, which was already subject to a mortgage to a loan company and a judgment lien for $10,000 in favor of the mother of petitioner.

The recitals in the decree (App. 11, of Petition) show that the motion to amend the stipulation or "void said stipulation" was denied and the stipulation again approved and the decree entered after a full hearing of the matter at which petitioner was present. The authority of Mr. Perona to sign the stipulation and present the decree was challenged in open court by petitioner's motion. By its action the Court decided that the stipulation represented the agreement of the parties and that its execution and filing by Mr. Perona was authorized. In response to petitioner's objection that he could not give a mortgage to respondent which would be a second lien, the Court in its decree provided that respondent might retain her interest as a joint tenant in the real estate until petitioner gave her a mortgage which was a second lien.

Mr. Perona did not make a settlement of petitioner's case without authority as charged by petitioner, and the question of his use of the word "lien" instead of the word "mortgage" was submitted to the Trial Court in an open hearing after notice to petitioner, giving him sufficient time to prepare and present written objections on the subject. The Trial Court is the proper forum in which to determine the extent of the authority of an attorney for a party to a case. 7 C.J.S. 884, Attorney and Client, Sec. 74. The record shows the proceedings meet all the requirements of due process of law.

III.

The Order Of September 26, 1966 Was Proper.

In Section 16, Chapter 40, Illinois Revised Statutes of 1965, it is provided:

> "In case of appeal by the husband or wife, the court in which the decree or order is rendered may grant and enforce the payment of such money for her or his defense and such equitable alimony during the pendency of the appeal as to such court shall seem reasonable and proper."

Petitioner's complaint is directly contrary to the foregoing statute in Illinois. The court over several hearings knew the financial status of the parties. All of the property jointly owned was in the exclusive possession of petitioner and respondent was unemployed and impecunious. She was not able to support herself or hire attorneys to meet petitioner's appeal with its attendant expense for briefs, printing, and lawyers in an appellate court. The trial court sought to even up the scales so respondent could compete with a chance of sustaining her position.

The order of September 26, 1966 was not a penalty but followed a valid Illinois statute equalizing the chances of a fair presentation of respondent's claims in an appellate court. It involves no constitutional question of due process.

IV.

Petitioner Had A Fair Opportunity To Appeal Under The Illinois Statute And Rules Of Court.

Petitioner filed a notice of appeal on September 15, 1966, specifying the decree of August 31, 1966 (R. 92). Rule 33 of the Illinois Supreme Court required that the order or decree appealed from be specified. Chap. 110, Sec. 101.33(2) Ill. Rev. Stat. 1965. No other order or decree was specified.

Supreme Court Rule 36 required petitioner to file a praecipe with the clerk of the trial court designating what parts of the trial court record were to be incorporated in the record on appeal. Chap. 110, Sec. 101.36(1). Petitioner filed a request for the entire record of the case (R. 124 and 125). Rule 36 provided that the clerk should make up the record on appeal as soon as all the necessary copies or originals of the records and documents specified in the praecipe were in his possession.

Under these rules the judges and other parties have no power to limit the contents of the record on appeal, and as a practical matter the clerk always certifies all correct copies of his records which may be delivered to him by the appellant. If a report of trial proceedings is specified, Rule 36(1)(c) provides that the testimony and rulings desired by appellant shall be presented to the trial judge for his certificate of correctness and filed in the trial court.

Petitioner was entirely responsible for his record on appeal. There is no indication that the clerk of the trial court refused to certify any part of his record, or that petitioner or his attorneys were limited in any way in providing copies for the record on appeal. There is no apparent reason for the absence of the decree of divorce and the report of the divorce trial. Petitioner's claim that the divorce trial record or trial proceedings were excluded from the record on appeal is unfounded. There is no indication that he made any attempt to obtain the testimony or present any trial proceedings to the trial judge for certification, as required by the Illinois Supreme Court Rules.

The objections in the trial court to the praecipe and the docket entry by the judge on September 29, 1966, purporting to sustain objections to the inclusion of matters prior to the June 13 divorce decree, did not limit the record on appeal. The docket entry did not constitute an order of the court. *People* v. *Koning*, 18 Ill. App. 2d 119, 151 N.E. 2d 103, 106; *Mitchell* v. *VanScouk*, 1 Ill. 2d 160, 115 N.E. 2d 226, 234.

The docket entry was merely an informal notation by the judge. The record of the court is kept by the clerk. The docket for September 29 included the notation "(See order re: Motion)" (R. 156). The order in the clerk's record on the same matters made no reference to the objections to the praecipe and excluded nothing from the record on appeal (R. 170). It did not affect the petitioner or the clerk in making up the record on appeal.

In addition, there is no statute or rule of court authorizing the trial court to make orders limiting the praecipe or the contents of the record on appeal. An

order in accordance with the docket entry would have been erroneous. There is no indication that any Illinois court has ever entered such an order.

Thus the principal claim of denial of due process by the omission of parts of the trial court record from the record on appeal appears to be unfounded. The Illinois statute and rules of court permitted petitioner to provide the clerk with all such copies of the court record as petitioner desired to have included, and to file all such reports of trial proceedings as petitioner might have transcribed and certified by the trial judge. The Illinois rules provide a reasonable opportunity to review on appeal all orders of the trial court, in accordance with the accepted and usual course of judicial proceedings.

Therefore this case has no public importance and should not be reviewed by this court.

CONCLUSION.

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

Paul A. Ushman,
Gregg A. Young,
Harper Andrews,
Campbell Andrews,
Counsel for Respondent.